No. 96-779

# In the Supreme Court of the United States

OCTOBER TERM, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION, PETITIONER

*v.*

RALPH P. FORBES

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES AS AMICI CURIAE SUPPORTING PETITIONER


WILLIAM E. KENNARD
*General Counsel*
CHRISTOPHER J. WRIGHT
*Deputy General Counsel*
DANIEL M. ARMSTRONG
*Associate General Counsel*
C. GREY PASH, JR.
*Counsel*
*Federal Communications Commission*
*Washington, D.C. 20554*

WALTER DELLINGER
*Acting Solicitor General*
LAWRENCE G. WALLACE
*Deputy Solicitor General*
JONATHAN E. NUECHTERLEIN
*Assistant to the Solicitor General*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

Whether, when providing news-related programming to the communities they serve, broadcast stations licensed to state and local governmental entities are subject to First Amendment limitations inapplicable to private commercial broadcasters.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Interest of the Federal Communications Commission and the United States | 1 |
| Statement | 2 |
| Summary of argument | 11 |
| Argument | 13 |
| I. The First Amendment does not constrain the editorial choices of state-entity public broadcasters licensed to operate under the Communications Act | 14 |
| II. Even if "forum" analysis were applicable to the editorial decisions of state-entity broadcasters, petitioner's reasonable, viewpoiont-neutral choice of debate participants still would have been constitutional | 24 |
| Conclusion | 27 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Accuracy in Media, Inc.* v. *FCC*, 521 F.2d 288 (D.C. Cir. 1975), cert. denied, 425 U.S. 934 (1976) | 7, 8 |
| *Alabama Educ. Television Comm'n*, 50 F.C.C.2d 461 (1975) | 4 |
| *American Independent Party*, 62 F.C.C.2d 4, aff'd mem. *sub nom. McCarthy* v. *FCC*, No. 76-1915 (D.C. Cir. Oct. 21, 1976), cert. denied, 430 U.S. 955 (1977) | 6 |
| *Avins* v. *Rutgers*, 385 F.2d 151 (3d Cir. 1967), cert. denied, 390 U.S. 920 (1968) | 19 |
| *Block* v. *Meese*, 793 F.2d 1303 (D.C. Cir.), cert. denied, 478 U.S. 1021 (1986) | 18 |
| *Brown for President Comm.*, 75 F.C.C.2d 609 (1980) | 6 |
| *Buckley* v. *Valeo*, 424 U.S. 1 (1976) | 26 |

Cases—Continued: Page

*CBS, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94 (1973) ..... 14, 15, 19, 21
*CBS, Inc.* v. *FCC*, 453 U.S. 367 (1981) ..... 5, 20
*Carol Music, Inc.*, 37 F.C.C. 379 (1964) ..... 4
*Chandler* v. *Georgia Pub. Telecommunications Comm'n*, 917 F.2d 486 (11th Cir. 1990), cert. denied, 502 U.S. 816 (1991) ..... 11
*Chisholm* v. *FCC*, 538 F.2d 349 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976) ..... 5, 6
*City of New York Municipal Broadcasting Sys.*, 56 F.C.C.2d 169 (1975) ..... 8
*Codification of Commission's Political Programming Policies*, 7 F.C.C. Rcd 678 (1991), reconsideration granted in part, 7 F.C.C. Rcd 4611 (1992) ..... 5, 6, 8
*Commercial TV Stations*, 98 F.C.C.2d 1076 (1984), reconsideration denied, 104 F.C.C.2d 358 (1986), aff'd in part *sub nom. Action for Children's Television* v. *FCC*, 821 F.2d 741 (D.C. Cir. 1987) ..... 4
*Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d 1079 (1978) ..... 8
*Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985) ..... 24, 25
*Cosmopolitan Broadcasting Corp.*, 59 F.C.C.2d 558, reconsideration denied, 61 F.C.C.2d 257 (1976), rev'd, 581 F.2d 917 (D.C. Cir. 1978) ..... 4
*Cyril E. Sagan*, 1 F.C.C. Rcd 10 (1986) ..... 6
*Denver Area Educ. Telecommunications Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374 (1996) ..... 18, 25, 26
*Deregulation of Radio*, 84 F.C.C.2d 968, reconsideration granted in part, 87 F.C.C.2d 797 (1981), aff'd in part *sub nom. Office of Communication of United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983) ..... 4



Cases—Continued: Page

*En Banc Programming Inquiry*, 44 F.C.C. 2303 (1960) ..... 4
*FCC* v. *League of Women Voters*, 468 U.S. 364 (1984) ..... 6, 7, 8, 14, 16, 21
*FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979) .. 15
*FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) ..... 2
*FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940) ..... 3
*Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959) ..... 5
*Fox Broadcasting Co.*, 11 F.C.C. Rcd 11,101 (1996) ..... 6
*Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260 (1988) ..... 19
*Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) ..... 15
*Henry Geller*, 95 F.C.C.2d 1236 (1983), aff'd *sub nom. League of Women Voters Educ. Fund* v. *FCC*, 731 F.2d 995 (D.C. Cir. 1984) ..... 6
*International Society for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672 (1992) ..... 17
*Iowa State Univ. Broadcasting Corp.*, 9 F.C.C. Rcd 481 (1993), aff'd *sub nom. Iowans for WOI-TV, Inc.* v. *FCC*, No. 94-1014, 1995 WL 116251 (D.C. Cir. Feb. 24, 1995) (50 F.3d 1096 (Table)) ..... 7
*Kennedy for President Comm.* v. *FCC*, 636 F.2d 417 (D.C. Cir. 1980) ..... 8
*King Broadcasting Co.* v. *FCC*, 860 F.2d 465 (D.C. Cir. 1988) ..... 6
*Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995) ..... 16
*Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) ..... 17

Cases—Continued: Page

*Marcus* v. *Iowa Pub. Television*:
97 F.3d 1137 (1996), reh'g en banc granted, No. 96-3645SIDM (8th Cir. Dec. 10, 1996) ..... 22, 23
No. 96-3645SIDM (8th Cir. Dec. 10, 1996) ..... 22
*Mississippi Auth. for Educ. Television*, 71 F.C.C.2d 1296 (1979) ..... 8
*Muir* v. *Alabama Educ. Television Comm'n*, 688 F.2d 1033 (5th Cir. 1982), cert. denied, 460 U.S. 1023 (1983) ..... 7, 8, 11
*Office of Communication of United Church of Christ* v. *FCC*:
359 F.2d 994 (D.C. Cir. 1966) ..... 3
425 F.2d 543 (D.C. Cir. 1969) ..... 3
*Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) ..... 15, 16, 24, 25, 26
*Piarowski* v. *Illinois Community College*, 759 F.2d 625 (7th Cir.), cert. denied, 474 U.S. 1007 (1985) ..... 19
*Polk County* v. *Dodson*, 454 U.S. 312 (1981) ..... 16
*Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) ..... 2, 3, 12, 21
*Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 115 S. Ct. 2510 (1995) ..... 12, 13, 15, 16, 17, 18, 22, 24, 25, 26
*Rust* v. *Sullivan*, 500 U.S. 173 (1991) ..... 17
*Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4 (1942) ..... 2
*Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975) ..... 16, 21
*Television Assignments, Sixth Report and Order*, 41 F.C.C. 148 (1952) ..... 7
*Trustees of Univ. of Pennsylvania*, 69 F.C.C.2d 1294 (1978) ..... 4
*Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622 (1994) ..... 8, 18
*United States* v. *Kokinda*, 497 U.S. 720 (1990) ..... 17
*WCHS-AM-TV Corp.*, 8 F.C.C.2d 608 (1967) ..... 4



Cases—Continued: Page

*West* v. *Atkins*, 487 U.S. 42 (1988) ..... 16
*Widmar* v. *Vincent*, 454 U.S. 263 (1981) ..... 2, 16, 17, 18
*Yale Broadcasting Co.* v. *FCC*, 478 F.2d 594 (D.C. Cir.), cert. denied, 414 U.S. 914 (1973) ..... 4

Constitution, statutes and regulation:

U.S. Const. Amend. I ..... *passim*
Communications Act of 1934, ch. 652, 48 Stat. 1064 .... 2
47 U.S.C. 151 *et seq.* ..... 1
47 U.S.C. 153(h) ..... 4, 15
47 U.S.C. 153(10) (Supp. II 1996) ..... 4, 15
47 U.S.C. 303 ..... 3
47 U.S.C. 307(a) ..... 3
47 U.S.C. 312(a)(7) ..... 5, 8, 9, 20
47 U.S.C. 315(a) ..... 5, 8, 9, 19, 20
47 U.S.C. 315(a)(1)-(4) ..... 5
47 U.S.C. 399 ..... 8
47 U.S.C. 399b ..... 8
Educational Television Act of 1962, Pub. L. No. 87-447, 76 Stat. 64 ..... 7
Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 ..... 7
Radio Act of 1927, ch. 169, 44 Stat. 1162 ..... 2
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56:
§ 203, 110 Stat. 112 (to be codified at 47 U.S.C. 307(c)(1)(Supp. II 1996) ..... 2, 3
§ 204(a)(1), 110 Stat. 113 (to be codified at 47 U.S.C. 309(k) (Supp. II 1996) ..... 3
47 C.F.R. 73.621 ..... 8

Miscellaneous:

67 Cong. Rec. 5479 (1926) ..... 3
Federal Communications Comm'n, Mass Media Bureau, *Broadcast Station Totals* (May 9, 1997) ... 7
S.E. Frost, Jr., *Education's Own Stations* (1937) ..... 6
George N. Gordon, *Educational Television* (1965) ..... 7
S. Rep. No. 562, 86th Cong., 1st Sess. (1959) ..... 3

# In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-779

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
PETITIONER

*v.*

RALPH P. FORBES

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE EIGHTH CIRCUIT*

**BRIEF FOR THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**AND THE UNITED STATES AS AMICI CURIAE**
**SUPPORTING PETITIONER**

## INTEREST OF THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES

The Federal Communications Commission (FCC) is the agency to which Congress has delegated the authority to regulate the broadcasting industry under the Communications Act of 1934. See 47 U.S.C. 151 *et seq.* Congress and the FCC have committed substantial public resources—in the form of frequency allocations and federal funds—to the development of noncommercial educational broadcasting (commonly referred to as "public broadcasting"). In so doing, Congress and the FCC have acted on the

premise that the employees of all public broadcasting stations, of which more than two-thirds are licensed to state entities, will exercise the same editorial discretion over the content of their programming as their counterparts in private commercial broadcasting. In holding that the First Amendment constrains the editorial decisions of a state-entity licensee, however, the court of appeals' decision in this case threatens the premise underlying the federal regulatory scheme. The Commission and the United States therefore have a substantial interest in the outcome of this case.

## STATEMENT

1. a. Before passage of the Radio Act of 1927, ch. 169, 44 Stat. 1162, "the allocation of [broadcasting] frequencies was left entirely to the private sector, and the result was chaos." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 375 (1969). Congress recognized that, unless the federal government regulated access to the airwaves, each speaker would be drowned out in a "cacophony of competing voices." *Id.* at 376. Congress thus enacted the Communications Act of 1934, ch. 652, 48 Stat. 1064, "to protect the public interest in communications," *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14 (1942), by formulating "a unified and comprehensive regulatory system for the industry." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). Congress assigned enforcement responsibility under this new regulatory scheme to the FCC.

Broadcasters are granted station licenses for terms of up to eight years. Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, § 203, 110 Stat. 112 (to be codified at 47 U.S.C. 307(c)(1) (Supp. II 1996)). The Commission may grant and subsequently renew such licenses only after finding that doing so will serve "the public convenience, interest, or necessity." 47 U.S.C. 303, 307(a); see 1996 Act §§ 203, 204(a)(1), 110 Stat. 112-113 (to be codified at 47 U.S.C. 307(c)(1), 309(k) (Supp. II 1996)). The "policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license." *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940).



A central element of this regulatory scheme is the responsibility of the individual licensee, whether a governmental or private entity, to act as a public trustee. A broadcasting license is a public trust. The licensee obtains "the free and exclusive use of a limited and valuable part of the public domain" and, in return, assumes a duty to serve the public interest. See *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994, 997, 1003 (D.C. Cir. 1966). As one sponsor of a predecessor to the Communications Act observed 70 years ago, "the right of the public to service is superior to the right of any individual. * * * If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served." 67 Cong. Rec. 5479 (1926) (remarks of Rep. White); see also S. Rep. No. 562, 86th Cong., 1st Sess. 8 (1959) (amendments to Communications Act); *Red Lion*, 395 U.S. at 375-377; *Office of Communication of United Church of Christ* v. *FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969).

The "ability of the licensee to render the best practicable service to [its] community" is crucial to the Commission's licensing decisions. *Sanders Bros.*, 309 U.S. at 475. Specifically, a broadcaster must

direct issue-responsive programming to the identified needs of its community. See *Commercial TV Stations*, 98 F.C.C.2d 1076 (1984), reconsideration denied, 104 F.C.C.2d 358 (1986), aff'd in relevant part *sub nom. Action for Children's Television* v. *FCC*, 821 F.2d 741 (D.C. Cir. 1987); *Deregulation of Radio*, 84 F.C.C.2d 968, reconsideration granted in part, 87 F.C.C.2d 797 (1981), aff'd in relevant part *sub nom. Office of Communication of United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983). Failure to meet that requirement can lead to the denial of a broadcaster's renewal application. See *Alabama Educ. Television Comm'n*, 50 F.C.C.2d 461 (1975).

Each licensee must itself undertake, and therefore may not delegate, the "primary duty and privilege to select the material to be broadcast to his audience." *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2311-2312 (1960); see also *Yale Broadcasting Co.* v. *FCC*, 478 F.2d 594, 599-600 (D.C. Cir.), cert. denied, 414 U.S. 914 (1973). The FCC "has always regarded the maintenance of control over programming as a most fundamental obligation of the licensee," *WCHS-AM-TV Corp.*, 8 F.C.C.2d 608, 609 (1967), and has expressed strong disapproval of any decision by a licensee to relinquish control over portions of its programming. See, *e.g.*, *Trustees of Univ. of Pennsylvania*, 69 F.C.C.2d 1394 (1978); *Cosmopolitan Broadcasting Corp.*, 59 F.C.C.2d 558, reconsideration denied, 61 F.C.C.2d 257 (1976), rev'd on other grounds, 581 F.2d 917 (D.C. Cir. 1978); *Carol Music, Inc.*, 37 F.C.C. 379, 380, 400 (1964); see also 47 U.S.C. 153(h) (no broadcaster shall "be deemed a common carrier") (to be recodified at 47 U.S.C. 153(10) (Supp. II 1996)).

b. A broadcaster must exercise the same editorial control over its political programming that it exer-



cises over all other forms of programming. The Communications Act draws an important distinction, however, between political programming and political advertisements, over which candidates, rather than broadcasters, exercise absolute editorial control. See generally *Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959). The Act imposes a specific set of requirements on a broadcaster's sale (or contribution) of airtime to candidates for political advertising. Section 312(a)(7) gives all legally qualified federal candidates a limited right of "reasonable" access to the airwaves, and Section 315(a) provides that, if any legally qualified candidate for public office "use[s]" a broadcast station (by, for example, purchasing airtime for political advertisements), other candidates for the same office must be given an "equal opportunit[y]" to use that station as well. See 47 U.S.C. 312(a)(7), 315(a); see generally *CBS, Inc.* v. *FCC*, 453 U.S. 367 (1981); *Kennedy for President Comm.* v. *FCC*, 636 F.2d 417, 422-424 (D.C. Cir. 1980); *Codification of Commission's Political Programming Policies*, 7 F.C.C. Rcd 678, 680-686 (1991), reconsideration granted in part, 7 F.C.C. Rcd 4611 (1992).

A candidate's appearance in a broadcaster's news programming, however, is not a "use" by that candidate of the broadcaster's station. 47 U.S.C. 315(a). It is instead an intrinsic part of any broadcaster's journalistic efforts to inform the public about political developments. Accordingly, the Communications Act exempts news programming, including such "bona fide news events" as televised candidate debates, from any "equal opportunities" requirement that would grant rights of appearance or participation to excluded candidates. See 47 U.S.C. 315(a)(1)-(4); *Chisholm* v. *FCC*, 538 F.2d 349 (D.C. Cir.), cert.

denied, 429 U.S. 890 (1976); *Henry Geller*, 95 F.C.C.2d 1236 (1983), aff'd *sub nom. League of Women Voters Educ. Fund* v. *FCC*, 731 F.2d 995 (D.C. Cir. 1984) (Table); see also *American Independent Party*, 62 F.C.C.2d 4, aff'd mem. *sub nom. McCarthy* v. *FCC*, No. 76-1915 (D.C. Cir. Oct. 21, 1976), cert. denied, 430 U.S. 955 (1977).

Moreover, a televised candidate debate is a "bona fide news event," and qualifies for the exemption from the equal-opportunities requirement, even if the debate is sponsored by the broadcaster itself. See *Henry Geller*, *supra*; see also *King Broadcasting Co.* v. *FCC*, 860 F.2d 465, 466-467 (D.C. Cir. 1988); *Fox Broadcasting Co.*, 11 F.C.C. Rcd 11,101 (1996). The Commission has indicated, however, that it will recognize that exemption only where a broadcaster's decision to exclude a candidate from a debate it has sponsored rests on a reasonably based, good-faith journalistic judgment about the most effective way to present the debate to the public, and not on a desire to promote or suppress the views of a particular candidate. See, *e.g.*, *Codification of Commission's Political Programming Policies*, 7 F.C.C. Rcd at 684, 685 n.51; *Cyril E. Sagan*, 1 F.C.C. Rcd 10 (1986); *Brown for President Comm.*, 75 F.C.C.2d 609, 613-614 (1980); see also *Chisholm*, 538 F.2d at 358-360.

c. "The history of noncommercial, educational broadcasting in the United States is as old as broadcasting itself." *FCC* v. *League of Women Voters*, 468 U.S. 364, 367 (1984); see also S.E. Frost, Jr., *Education's Own Stations* 464 (1937). Between 1921 and 1936, the federal government issued approximately 200 radio broadcast licenses to educational institutions, many of which were public. See *id.* at 2-5. When the FCC first reserved frequencies for



noncommercial educational (or "public") television use, it fully expected that many public broadcasting facilities would be licensed to, and financed by, state and local governmental entities. See *Television Assignments, Sixth Report and Order*, 41 F.C.C. 148, 164-167 (1952); *id.* at 592 (separate opinion of Commissioner Hennock).[1] Approximately two-thirds of public broadcasting stations are now licensed to governmental entities. See *League of Women Voters*, 468 U.S. at 393 n.22.[2]

With few exceptions, public broadcasters are subject to the same regulatory standards as commercial broadcasters, including the requirement that each licensee retain editorial control over the content of its

---

[1] Since 1962, the federal government has provided substantial public funding for noncommercial educational broadcasting. See Educational Television Act of 1962, Pub. L. No. 87-447, 76 Stat. 64; Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365; see also *Accuracy in Media, Inc.* v. *FCC*, 521 F.2d 288, 292 (D.C. Cir. 1975), cert. denied, 425 U.S. 934 (1976); *Muir* v. *Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1040 (5th Cir. 1982) (en banc), cert. denied, 460 U.S. 1023 (1983).

[2] Today, noncommercial educational stations in general (including those licensed to private entities) account for 365 of the 1,555 television broadcast licenses in the United States; among the nation's 12,142 total radio stations, 1,871 are classified as noncommercial educational stations. See Federal Communications Comm'n, Mass Media Bureau; *Broadcast Station Totals* (May 9, 1997). Although governmental entities typically seek licenses to operate noncommercial educational stations, they may, and occasionally do, operate commercial stations as well. See, *e.g.*, *Iowa State Univ. Broadcasting Corp.*, 9 F.C.C. Rcd 481 (1993), aff'd *sub nom. Iowans for WOI-TV, Inc.* v. *FCC*, No. 94-1014, 1995 WL 116251 (D.C. Cir. Feb. 24, 1995) (50 F.3d 1096 (Table)); George N. Gordon, *Educational Television* 9 (1965).

programming.[3] In particular, the FCC has addressed, and has specifically rejected, the position that the editorial decisions of state-entity broadcast licensees are subject to greater legal constraints than the decisions of any other licensee. The Commission reasons that, because there is no constitutional right of access to a broadcast station, and because Congress refused to treat broadcasters as common carriers, state-entity licensees have both the same "public trustee" responsibilities and the same editorial discretion as private licensees. Accordingly, the Commission has concluded that the "public forum doctrine" is not applicable to, and the First Amendment does not restrict, a state-entity licensee's choice and selection of programming. See *Mississippi Auth. for Educ. Television*, 71 F.C.C.2d 1296, 1303 n.12 (1979); *City of New York Municipal Broadcasting Sys.*, 56 F.C.C.2d 169, 170 (1975).

2. This case concerns the constitutionality of a decision by the Arkansas Educational Television Network (AETN) to sponsor and broadcast a 1992 debate

[3] See *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622, 650-651 (1994); *League of Women Voters*, 468 U.S. at 367; *Muir*, 688 F.2d at 1040; *Accuracy in Media*, 521 F.2d at 291. The exceptions are a ban on supporting or opposing any candidate for office; a requirement that such broadcasters operate on a noncommercial, nonprofit basis; and a general prohibition against accepting payment for the broadcast of commercial or political advertisements. See 47 U.S.C. 399, 399b; 47 C.F.R. 73.621. Like all other licensees, however, public broadcasters are subject to the "reasonable access" and "equal opportunities" requirements of Sections 312(a)(7) and 315(a) of the Communications Act. See, *e.g.*, *Codification of Commission's Political Programming Policies*, 7 F.C.C. Rcd at 681; *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d 1079, 1092-1094 (1978).



between the two leading candidates for a seat in the United States House of Representatives. Petitioner Arkansas Educational Television Commission (AETC), an Arkansas state agency, operates AETN.[4] Petitioner did not invite respondent Ralph P. Forbes, an independent candidate for the congressional seat at issue, to participate in the debate. That decision rested not on any disagreement with respondent's political viewpoint, but on his lack of public support, the absence of public interest in his candidacy, and his negligible chance of electoral success. See Pet. 2-3, 6, 14-15; Pet. App. 8a-9a.

Although candidates seeking airtime on any broadcast station may pursue various administrative remedies under Sections 312(a)(7) and 315(a) of the Communications Act by filing a complaint with the FCC, see pp. 5-6, *supra*, respondent filed no such complaint and instead sought relief directly in federal district court, asserting, among other things, a First Amendment right to participate in the debate. The district court dismissed the suit for failure to state a legally valid claim, and respondent unsuccessfully sought preliminary injunctive relief in the court of appeals. See Pet. App. 43a-44a.

Sitting en banc to hear respondent's appeal on the merits, however, the Eighth Circuit remanded the case to the district court for further proceedings. Pet. App. 25a-42a (*Forbes I*). It held that AETN is a state actor, that it "is faced with constraints not shared by other television stations," that respondent had "a qualified right of access created by [petitioner's] sponsorship of a debate," and that petitioner

[4] We will refer to AETC and AETN collectively as "petitioner."

"must have a legitimate reason to exclude him strong enough to survive First Amendment scrutiny." *Id.* at 33a-34a. The court suggested that whether or not petitioner's "reason" was "strong enough" turned on whether the debate should be characterized as a "nonpublic" or, alternatively, as a "limited public" forum, an issue that the court remanded to the district court. *Id.* at 34a-37a. This Court denied certiorari. 513 U.S. 995 (1994).

On remand, the district court found as a matter of law that the debate was a nonpublic forum. See Pet. App. 6a. The court also submitted to the jury special interrogatories asking whether the decision to exclude respondent from the debate was influenced by political pressure or disagreement with respondent's views. The jury answered those questions in the negative. See *id.* at 7a-9a. Based on those findings, the district court ruled for petitioner.

The court of appeals reversed. Pet. App. 1a-18a (*Forbes II*). The court accepted the jury's determination that the decision to exclude respondent from the debate was viewpoint-neutral and free of influence from political pressure. See *id.* at 7a-9a. Indeed, it specifically found that the decision to exclude petitioner "was made in good faith" and was "exactly the kind of journalistic judgment routinely made by newspeople." *Id.* at 16a. Nonetheless, although the court acknowledged (*id.* at 15a) that petitioner had never intended to open the debate to all legally qualified candidates, it held that the debate was a "limited public forum" and that petitioner was without authority to exclude peripheral candidates: "Whether [respondent] was viable was, ultimately, a judgment to be made by the people of the Third Congressional District, not by officials of the government



in charge of channels of communication." *Id.* at 16a.[5] Finding that petitioner's reason for excluding respondent from the debate was "neither compelling nor narrowly tailored"—the standard of review that the court deemed applicable to speech restrictions in limited public forums—the court reversed and remanded for an assessment of damages. *Id.* at 17a-18a.

On September 25, 1996, Justice Thomas denied petitioner's application to stay enforcement of the Eighth Circuit's decision pending the filing of a petition for certiorari. See Pet. 8. On September 26, 1996, the Eighth Circuit, in denying petitioner's motion to stay its mandate, issued a one-paragraph clarification of its earlier decision. Pet. App. 19a. The court stated that petitioner remains free, "to the extent provided by law," to cover "bona fide news events," including candidate debates, that are "organized by people or groups other than [petitioner]." *Ibid.* The court added that its earlier decision did not necessarily require petitioner to invite write-in candidates to participate in any debate that it sponsored. *Ibid.*

## SUMMARY OF ARGUMENT

In sponsoring a televised candidate debate, any broadcaster, whether public or private, makes numerous, interrelated editorial judgments concerning the debate's format, content, purpose, and participants. The product of those judgments is an expressive news program designed to satisfy the broadcaster's statu-

---

[5] In so holding, the court noted (Pet. App. 37a n.4) that its decision conflicted with a decision reached by the Eleventh Circuit on essentially indistinguishable facts. See *Chandler* v. *Georgia Pub. Telecommunications Comm'n*, 917 F.2d 486 (1990), cert. denied, 502 U.S. 816 (1991); see also *Muir*, *supra*.

tory duty to exercise its own journalistic discretion to inform its viewers on matters of public interest. Sponsorship by a state actor does not convert that news program into a "public forum" to which private individuals have a constitutional right of access. Instead, televised debates and other news programs sponsored by state-entity broadcasters, like academic lecture series sponsored by state universities, are informative, focused presentations that, as a general matter, a state actor may constitutionally create, structure, and invest with such content as it deems appropriate. See generally *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 115 S. Ct. 2510, 2519 (1995); *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981).

Indeed, subjecting the editorial discretion of state-entity broadcasters to case-by-case constitutional scrutiny would disserve "the First Amendment goal of producing an informed public capable of conducting its own affairs." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 392 (1969). Compelling state-entity broadcasters to invite every legally qualified candidate to any debate that they sponsor, or even exposing those broadcasters to a threat of constitutional litigation for excluding particular candidates, could discourage many such broadcasters from sponsoring political debates at all. Moreover, there is no obvious limiting principle that would afford minor candidates a constitutional "right of access" to televised debates but not, for example, to evening news broadcasts featuring interviews with the major candidates. Indeed, carried to its logical conclusion, the court of appeals' reasoning—that "journalistic judgment[s] routinely made by newspeople" cannot be entrusted to "employees of government" (Pet. App. 16a)—could bar state-entity broadcasters from structuring weekly panel



discussions to include certain outside commentators but not others who might also wish to participate.

Because broadcast journalism often requires difficult judgments about the range of differing viewpoints that can be feasibly and usefully presented on any given topic, application of "forum" analysis to the editorial decisions of state-entity broadcasters could imperil the ability of those broadcasters to air many kinds of news programming. Nonetheless, even if that analysis were applicable, which it is not, and even if (as the court of appeals believed) the debate at issue here could properly be characterized as a limited public forum, petitioner's decision to exclude respondent would be constitutional. Petitioner's decision to exclude non-major candidates from the debate was both viewpoint-neutral and reasonably calculated to preserve the character of the debate as an efficient means for community viewers to learn the positions of the principal candidates. That showing is enough to justify regulation of speech in either a limited public forum or a nonpublic forum. See *Rosenberger*, 115 S. Ct. at 2517.

## ARGUMENT

The court of appeals held that a state-entity public broadcaster, when sponsoring a political debate for the benefit of the viewers in its community, may not limit the participants to the principal candidates, but must also invite every "legally qualified" candidate—no matter how peripheral—for the elective office at issue. That decision was incorrect and should be reversed.

## I. THE FIRST AMENDMENT DOES NOT CONSTRAIN THE EDITORIAL CHOICES OF STATE-ENTITY PUBLIC BROADCASTERS LICENSED TO OPERATE UNDER THE COMMUNICATIONS ACT

a. "Congress specifically dealt with—and firmly rejected—the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues." *CBS, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 105 (1973). Instead, Congress relied on the diverse editorial decisions of individual broadcasters, combined with each broadcaster's statutory duty to serve the needs of its viewing community, to ensure a rich marketplace of ideas in television broadcasting. See, *e.g.*, *FCC* v. *League of Women Voters*, 468 U.S. 364, 378 (1984). "For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspapers or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values." *CBS, Inc.*, 412 U.S. at 124-125.

That judgment is no less applicable to state-entity broadcasters than to any other broadcaster. See *League of Women Voters*, 468 U.S. at 392 n.21, 397-399; see also *CBS, Inc.*, 412 U.S. at 121-132 ("assuming [that] governmental action" inheres in the actions of commercial broadcasters in their role as public trustees, an issue on which the Court reached no majority, the First Amendment nonetheless creates no "right-of-access" to broadcast stations for purchase of editorial advertising). The Communications Act and the FCC's detailed regulatory scheme require every broadcaster, whether public or private, to



use its own editorial discretion to serve the public interest, and no broadcaster may cede that responsibility to members of the general public. See pp. 4-5, *supra*; *CBS, Inc.*, 412 U.S. at 108-114; see also 47 U.S.C. 153(h) (no broadcaster shall "be deemed a common carrier") (to be recodified at 47 U.S.C. 153(10) (Supp. II 1996)); *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979).

A state-entity broadcaster's responsibility to exercise editorial control and judgment over the content of its programming is therefore inconsistent with any characterization of those broadcasters, or of the programs each such broadcaster airs, as "public forums." A structured debate between the two major candidates for a given political office, sponsored and aired by a state-entity licensee, is a news program designed to meet the viewing needs of the licensee's broadcast community. See pp. 5-6, *supra*. A news program is more likely to meet those needs if, as Congress intended, the sponsoring broadcaster may exercise its journalistic discretion to exclude material that would detract from the program's overall effectiveness. Such programs are not, and should not be equated with, government property opened up for untrammeled expression by a broad variety of individual speakers, cf. *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 115 S. Ct. 2510, 2517 (1995); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981), and they therefore do not create a right of access to every peripheral candidate who wishes to appear on television.

b. The court of appeals erred not simply in characterizing a state-entity licensee's news programming

as a "limited public forum," but also, more fundamentally, in employing "forum" analysis at all to resolve this case. As discussed in point II below, this Court has relied upon that analysis to determine the proper level of First Amendment scrutiny applicable to restrictions on private speech that, while delivered on (or by means of) public property, is not itself part of a state actor's own expressive presentation to the public. See generally *Rosenberger*, 115 S. Ct. at 2518-2519; *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975). In that context, even when the public property at issue is characterized as a "nonpublic" forum, a speech regulation may be subject to significant First Amendment constraints (such as a viewpoint-neutrality requirement). See, *e.g.*, *Perry Educ. Ass'n*, 460 U.S. at 46.

But "forum" analysis is altogether inapplicable where, as here, a state actor[6] creates, and exercises

[6] Petitioner "is an agency of the State of Arkansas," Pet. 2, and is therefore "part of the Government for purposes of the First Amendment." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995); cf. *West* v. *Atkins*, 487 U.S. 42, 50-51 (1988); *Polk County* v. *Dodson*, 454 U.S. 312, 320-322 (1981). Nonetheless, federal law insulates the editorial decisions of state-entity broadcasters from political influence by the federal government, see *League of Women Voters*, 468 U.S. at 389-390, 394, and the Communications Act imposes on such broadcasters the same obligation to serve the public interest as it imposes on other licensees. Moreover, petitioner's organizational structure and operating principles serve to protect its editorial decisions from influence by state or local government officials. See J.A. 110-112, 195-197; see also Pet. App. 7a-8a (accepting jury's finding that the decision to exclude respondent from the debate was not "influenced in any way by political pressure from anyone inside or outside of the Arkansas Educational Television Network"). Although such influence on a broadcaster (whether or not it is a state entity) might impair the broadcaster's performance of its statutory obligations under the Communications Act, it would not, in our view, change the analysis under the First Amendment.



continuing editorial control over, a structured news or educational program designed to edify the public on discrete topics. Cf. *Rosenberger*, 115 S. Ct. at 2519. In that setting, among others, the state actor may take the same reasonable measures a private party might pursue in analogous circumstances to ensure that its program is "neither garbled nor distorted." *Ibid.*; cf. *International Society for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992) (distinguishing, for First Amendment purposes, between government "as lawmaker" and government "as a proprietor"); *United States* v. *Kokinda*, 497 U.S. 720, 725-726 (1990) (plurality opinion) (similar); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 303-304 (1974) (plurality opinion) (similar).

That conclusion follows from the more general principle that, "when the State is the speaker, it may make content-based choices." *Rosenberger*, 115 S. Ct. at 2518 (citing, *inter alia*, *Widmar*, 454 U.S. at 276, and *Rust* v. *Sullivan*, 500 U.S. 173 (1991)); see also *id.* at 2548 n.11 (Souter, J., dissenting). Of course, a televised candidate debate contains much speech that is not itself the speech of the sponsoring broadcaster and cannot be attributed to the broadcaster: during the course of the debate, the candidates give their own answers to the questions they are asked. Nonetheless, the program itself—much like televised weekly panel discussions featuring the views of designated outside commentators—is the expressive product of a

series of interrelated journalistic judgments by the broadcaster about format, purpose, the topics to be addressed, and the participants to be invited. Those judgments, and the news programs that they shape, are no more subject to First Amendment challenge than would be the direct expression of a government spokesperson's views on a matter of public importance. See generally *Block* v. *Meese*, 793 F.2d 1303, 1312-1314 (D.C. Cir.), cert. denied, 478 U.S. 1021 (1986). By analogy, when private actors sponsor candidate debates (or televised weekly panel discussions), their editorial choice of program form and content is at least as expressive in character, and at least as close to the core of the First Amendment's concern for journalistic freedom, as a cable operator's selection of programming channels for carriage, which the Constitution protects. See *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622, 636-641 (1994); see also *Denver Area Educ. Telecommunications Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374, 2386-2388 (1996) (plurality opinion); *id.* at 2423-2425 (opinion of Thomas, J.); see generally *Rosenberger*, 115 S. Ct. at 2548 n.11 (Souter, J., dissenting).

Outside the broadcasting context as well, the First Amendment permits a state actor, *inter alia*, to structure a focused presentation for a discrete public purpose by selecting some private individuals, but not others, to participate in the presentation by giving their own disparate views on given subjects. For example, in sponsoring a lecture series, a state university may invite outside speakers to give a diversity of opinions on a topic without thereby bestowing on individuals with additional (or contrary) opinions a constitutional right of access to the podium. See *Widmar*, 454 U.S. at 276-277; see also



*Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 267-273 (1988); *Avins* v. *Rutgers*, 385 F.2d 151 (3d Cir. 1967) (denying claim of First Amendment right to publish article in law review issued by state university), cert. denied, 390 U.S. 920 (1968). Similarly, in structuring a ceremony to commemorate the anniversary of a historical event, the federal government may select private speakers to give a range of viewpoints on that event—which may or may not coincide with any official government position—without thereby incurring an obligation to ensure that all available viewpoints are represented. And the government may select certain individuals to create a public mural or monument that reflects some, but not all, views on a topic such as the Holocaust. Cf. *Piarowski* v. *Illinois Community College*, 759 F.2d 625, 631-632 (7th Cir.), cert. denied, 474 U.S. 1007 (1985).

The principal legal constraints on the news programming of a state-entity broadcaster therefore derive not from the First Amendment, but from the Communications Act, which directs all broadcasters, public and private, to exercise reasonable editorial discretion in serving the public interest. See *CBS, Inc.*, 412 U.S. at 124-125. And, as interpreted by the Commission, the Act also provides, in some circumstances, administrative remedies to candidates who can show that a broadcaster's news coverage is so arbitrarily neglectful of or hostile to their candidacies that it does not constitute a reasonably based, good-faith exercise of journalistic judgment.[7]

---

[7] See pp. 5-6, *supra*. In his amended complaint, respondent noted the "equal opportunities" provision of 47 U.S.C. 315(a), see J.A. 27, but he did not squarely contend that Section 315(a) entitled him to participation in the debate, see *ibid.*;

But the First Amendment provides no basis for subjecting the editorial discretion of state-entity licensees and programming networks to greater scrutiny than the discretion of their counterparts in private commercial broadcasting.

The court of appeals' decision appears to rest, at least in part, on the concern that, in the absence of First Amendment constraints, a state-entity broadcaster might arbitrarily discriminate against "all Republicans" or "all Methodists" in its choice of debate participants. Pet. App. 34a; see also *id.* at 4a (permitting state-entity licensee to exclude non-major candidates from debate would "place too much faith in government"). That concern is misguided. As an initial matter, such discrimination would subject any broadcaster, public or private, to administrative measures under the Communications Act. See pp. 5-6, *supra*; see also note 3, *supra*. Even in the absence of those statutory protections, however, the actions of a state-entity broadcaster, like all actions of any state actor, "must be sufficiently reasonable to satisfy the Due Process Clause and cannot unfairly discriminate in violation of the Equal

---

instead, he appeared to argue only that Section 315(a) entitled him to airtime on petitioner's stations for other purposes (such as airing an anti-abortion advertisement). See Pet. App. 31a. In any event, the court of appeals correctly denied his claim under Section 315(a) because he had failed to exhaust his administrative remedies before the FCC. *Ibid.* As discussed above (see p. 5, *supra*), Section 312(a)(7) of the Communications Act independently requires broadcasters to sell or donate airtime for use by federal political candidates. See 47 U.S.C. 312(a)(7); *CBS, Inc.* v. *FCC*, 453 U.S. 367 (1981). Respondent has raised no claim under that provision, which in any event has no relevance to a broadcaster's choice of political *programming*.



Protection Clause." *Southeastern Promotions*, 420 U.S. at 572 n.2 (Rehnquist, J., dissenting). Invidious discrimination against "all Republicans" or some other group, detached from any legitimate journalistic purpose, would lack a rational basis and would be constitutionally invalid on that ground alone. Cf. *ibid.* (even in absence of First Amendment constraints, "[a] municipal auditorium which opened itself to Republicans while closing itself to Democrats would run afoul of the Fourteenth Amendment").

c. Not only do First Amendment principles give private individuals no right to appear on public television, but they in fact counsel strongly against recognizing any such right. As this Court has held, the "First Amendment goal of producing an informed public capable of conducting its own affairs," *Red Lion*, 395 U.S. at 392, is better served not by granting private individuals rights of access to the airwaves, but by respecting the "journalistic discretion of broadcasters in the coverage of public issues." *CBS, Inc.*, 412 U.S. at 124; see also *League of Women Voters*, 468 U.S. at 398.

State-entity broadcasters and programming networks may effectively exercise that discretion only if they, like all other broadcasters and programmers, are permitted to structure their news programming without fear that aggrieved parties will sue to challenge the details of that programming as the products of unconstitutional editorial criteria. Cf. *CBS, Inc.*, 412 U.S. at 127 (rejecting "right-of-access" interpretation of Communications Act that would require "a continuing case-by-case determination of who should be heard and when"). Journalism inevitably requires difficult judgments about content, and no journalist

can cover all viewpoints on all topics. Subjecting the editorial decisions of public broadcasters to case-by-case scrutiny for content- or viewpoint-neutrality under "forum" analysis, see *Rosenberger*, 115 S. Ct. at 2517, could seriously discourage such broadcasters from providing full coverage of political contests.

Carried to its logical conclusion, the court of appeals' contrary approach would invite constitutional litigation concerning not just political debates aired by state-entity licensees and programming networks, but also a broad range of other news programming that has traditionally fallen within every broadcaster's editorial discretion. For example, any state-entity broadcaster or programming network that airs an interview with a political candidate as part of its nightly news coverage could arguably be required, under the Eighth Circuit's reasoning, to air a separate interview of every rival candidate who seeks equal public exposure.[8] Moreover, the Eighth

[8] While the petition for certiorari in this case was pending, the Eighth Circuit agreed to en banc consideration of whether a state-entity licensee may sponsor and air news programs featuring interviews with the "major candidates" for political office. See *Marcus* v. *Iowa Pub. Television*, No. 96-3645SIDM (Dec. 10, 1996). A divided panel of the Eighth Circuit had earlier denied preliminary injunctive relief to non-major candidates who sought to appear on those programs; it reasoned that, even if the programs at issue are limited public forums, the state-entity licensee likely has a "compelling interest" in "limiting access to newsworthy candidates." *Marcus* v. *Iowa Pub. Television*, 97 F.3d 1137, 1144 (1996). In analysis that a dissenting judge characterized as an effort "to distinguish the indistinguishable," *ibid.* (Beam, J., dissenting), the panel majority explained its tentative departure from the decision in this case on the ground that, "[u]nlike 'viability,' which is ultimately for the voters to decide, 'newsworthiness' is peculiarly a



Circuit's reasoning would also seem to grant rights of television access not just to uninvited candidates, but to anyone with a view about a matter of public controversy. If, as the court of appeals believed, "journalistic judgment[s] routinely made by newspeople" cannot be entrusted to "employees of government" (Pet. App. 16a), then, arguably, anyone could demand airtime to respond to the views expressed by anyone else interviewed in a news program, or featured in a panel discussion, sponsored by a state-entity licensee or programming network.

Even if confined to the context of candidate debates, however, the court of appeals' approach would harm public awareness of, and discussion about, political contests throughout the United States. The value of a debate does not necessarily increase with the number of participants; as common sense suggests, the inclusion of too many participants could make almost any debate unwieldy and uninformative. As a practical matter, the Eighth Circuit's approach could well lead many state-entity broadcasters simply to abandon plans to sponsor candidate debates. For example (see Pet. 11), the Nebraska Educational Telecommunications Network canceled a 1996 senatorial debate because it feared that, under the decision below, it would have to invite all minor candidates who wished to appear alongside the major contenders. Such consequences are unfortunate: not just for state-entity licensees themselves, but, more significantly, for the innumerable American citizens who

decision within the domain of journalists." *Id.* at 1142. On March 24, 1997, the Eighth Circuit deferred further consideration of *Marcus* until after this Court's final disposition of this case.

rely on such licensees to sponsor televised debates among the principal candidates for federal, state, and local offices.

## II. EVEN IF "FORUM" ANALYSIS WERE APPLICABLE TO THE EDITORIAL DECISIONS OF STATE-ENTITY BROADCASTERS, PETITIONER'S REASONABLE, VIEWPOINT-NEUTRAL CHOICE OF DEBATE PARTICIPANTS STILL WOULD HAVE BEEN CONSTITUTIONAL

As a general matter, "forum" analysis imposes constitutional constraints on government regulation of private expression on (or by means of) public property that the government does not itself seek to use as the site or medium of its own expressive presentation to the public. See generally *Perry Educ. Ass'n*, 460 U.S. at 45-46. The most basic distinction drawn in this area is between "traditional" public forums, in which the government may not regulate on the basis of speech content without a compelling state interest, and "nonpublic forum[s]," in which speech "can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (quoting *Perry Educ. Ass'n*, 460 U.S. at 46).

Similar to "nonpublic" forums are forums "limited" to certain subjects or groups; there too, non-viewpoint-based "content discrimination * * * may be permissible if it preserves the purposes of th[e] limited forum." *Rosenberger*, 115 S. Ct. at 2517; see also *Perry Educ. Ass'n*, 460 U.S. at 46 n.7. "Limited" public forums are a subset of "designated" public forums, and should be distinguished from other



kinds of designated forums that are not so limited, such as historically closed government property that the government has "generally open[ed] to the public" as "a place for expressive activity" of all kinds. *Id.* at 45. Speech restrictions in that latter category of "designated" public forum, unlike speech restrictions in forums "limited" to certain topics or groups, are generally subject to the same strict content-neutrality requirement applicable to truly traditional public forums such as streets and sidewalks. See *id.* at 45-46 & n.7; *Cornelius*, 473 U.S. at 802; cf. *Denver Area*, 116 S. Ct. at 2388-2389 (plurality opinion); *id.* at 2413-2414 (opinion of Kennedy, J.).

Because the First Amendment has no application to the editorial choices that define a state-entity broadcaster's news programming, this case can and should be decided without reference to "forum" analysis. That analysis, as we have observed (see p. 16, *supra*), is applicable only where the government passively permits the use of its property to "encourage a diversity" of private views, see *Rosenberger*, 115 S. Ct. at 2519; but it is inapplicable in (for example) the circumstances presented here, in which a state actor designates private speakers to participate in a focused presentation that the state actor itself has designed for a discrete public purpose and over which it exercises close editorial control.

Nonetheless, even if "forum" analysis were applicable in this context, which it is not, then—whether this candidate debate is properly characterized as a "limited public" or as a "nonpublic" forum—petitioner's choice of debate participants still would have been constitutional. The court of appeals not only acknowledged that petitioner's decision to exclude respondent from the debate was "exactly the kind of

journalistic judgment routinely made by newspeople," Pet. App. 16a, but further accepted the jury's determination that petitioner's decision was not influenced by political pressure and was not "based on disagreement with [respondent's] political viewpoint," *id.* at 9a.

Thus, under the facts embraced by the court of appeals, petitioner's choice of participants was viewpoint-neutral (and arguably content-neutral as well) and reasonably calculated to preserve the character of the debate. Petitioner created the debate as an efficient means for community viewers to learn more about the candidates who, with the election drawing near, had attracted significant public interest or support; and to that original and entirely legitimate purpose petitioner remained faithful. See generally *Buckley* v. *Valeo*, 424 U.S. 1, 96 (1976) (per curiam) ("Congress' interest in not funding hopeless candidacies with large sums of public money necessarily justifies the withholding of public assistance from candidates without significant public support.") (citation omitted); see also *Denver Area*, 116 S. Ct. at 2414 (opinion of Kennedy, J.). A state actor need show no more to justify speech regulations designed "to preserve the limits of the forum it has created." *Rosenberger*, 115 S. Ct. at 2517 (speech restrictions in limited public forum must be viewpoint-neutral and "reasonable in light of the purpose served by the forum"); *id.* at 2547-2549 (Souter, J., dissenting); accord *Perry Educ. Ass'n*, 460 U.S. at 46 & n.7;



## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WALTER DELLINGER
*Acting Solicitor General*

WILLIAM E. KENNARD
*General Counsel*

LAWRENCE G. WALLACE
*Deputy Solicitor General*

CHRISTOPHER J. WRIGHT
*Deputy General Counsel*

JONATHAN E. NUECHTERLEIN
*Assistant to the Solicitor General*

DANIEL M. ARMSTRONG
*Associate General Counsel*

C. GREY PASH, JR.
*Counsel*
*Federal Communications Commission*

MAY 1997